United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 22, 2001

TO : Victoria E. Aguayo, Regional Director

Region 21

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Worldtec Group International, Inc. 506-6080-0800

Case 21-CA-33761

This case was submitted for advice as to whether the Employer's withdrawn state court lawsuit against the Union and the Union's President violated Section 8(a)(1) of the Act under Bill Johnson's.

FACTS

Worldtec Group International, Inc. ("the Employer") is engaged in the business of leasing employees to its customers for warehouse and cross-dock operations. DSL Transportation Services, Inc. ("DSL") was a customer of the Employer during the relevant time period. The Industrial, Professional and Technical Workers International Union ("the Union") is the collective bargaining representative for the Employer's employees, including those leased to perform warehouse and cross-dock operations for DSL.

The Union and the Employer were parties to a collective-bargaining agreement from August 1, 1997 to August 7, 1998 that covered employees performing work in various warehouse and cross-dock work classifications. In mid-1998, prior to the expiration of the contract, the Union filed five grievances against the Employer.² Each grievance was subsequently submitted to arbitration and awards were

¹ Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1984).

² The grievances concerned: 1) the discharge of an employee;

²⁾ the Employer's failure to pay cost-of-living increases;

³⁾ the Employer's failure to extend the collective-bargaining agreement to its City of Industry, California location; 4) the Employer's failure to pay employees their proper contractual wage rate; and 5) the Employer's failure to pay union dues and initiation fees.

issued in the Union's favor in all five cases in the spring and summer of 1999.3

Following the expiration of the collective-bargaining agreement on August 7, 1998, the parties engaged in negotiations to reach a successor agreement. On January 4, 1999, the Union filed a charge against the Employer alleging that the Employer violated Section 8(a)(5) by failing to pay bargaining-unit employees their contractually required costof-living increase. The charge was litigated in March 2000 and is currently pending decision before an ALJ. On January 15, 1999, the Employer announced that negotiations with the Union were at an impasse and that a new contract with changes in wages and benefits would be implemented on February 1, 1999. On January 21, 1999, Union President Walsh wrote a letter to Employer customer DSL expressing frustration over the status of negotiations and setting forth the details of the parties' negotiations. Walsh closed the letter by stating that the Union had decided to have another union come in and take over the contract and that the Union no longer cares to deal with the Employer due to its bad-faith bargaining.

On January 26, 1999, the Employer notified the Union that it was withdrawing recognition from the Union based on what it asserted was a Union disclaimer of interest in its letter to DSL. In response, on February 4, 1999, the Union filed a charge against the Employer alleging it violated Section 8(a)(5) by withdrawing recognition from the Union. The charge was also litigated in March 2000 and is currently pending decision before an ALJ.

On April 15, 1999, DSL sent the Employer a letter providing it 30-days notice that the contract between DSL and the Employer would terminate on May 15, 1999. On April 29, 1999, the Union filed a charge against the Employer alleging that it violated Section 8(a)(5) of the Act by refusing to bargain over the effects of the impending DSL contract termination. The charge was also litigated in March 2000 and is currently pending decision before an ALJ.

³ All arbitration awards were confirmed by the federal district court between the summer of 1999 and the beginning of 2000. The Employer has appealed each of the court's orders to the Ninth Circuit Court of Appeals where they are currently pending.

On January 11, 2000, 4 the Employer filed a lawsuit against the Union and Union President Walsh in state court alleging: 1) tortious interference with contract; and 2) negligent interference with contract or other economic relationship. The Employer alleged that the Union's January 21, 1999, letter to DSL contained false statements and was sent with the intent to harm the Employer financially and to induce DSL to cancel its contract with the Employer. The complaint specifically pled as a false statement the line in the letter stating "The money and time that has been wasted over negotiating with Worldtec and their Bad Faith Bargaining is more than this Union cares to deal with anymore." The suit sought exemplary and punitive damages, as well as general and special damages.

On February 4, the Union filed the instant charge against the Employer alleging that the Employer violated Sections 8(a)(1) and (4) of the Act by filing a lawsuit that seeks damages for conduct that is protected, and to retaliate against the Union for exercising its protected rights and for filing unfair labor practice charges.⁵

On May 31, the Union filed a demurrer to the Employer's complaint. On July 12, the court sustained the Union's demurrer reasoning that the Employer failed to state a cause of action. However, the state court granted the Employer leave to amend its complaint. On August 21, the Employer filed a second amended complaint, repeating the tortious and negligent interference with contract claims, but also alleging: 1) fraud; 2) negligent representation; and 3) defamation. On September 14, the Union filed a demurrer to the Employer's second amended complaint and the court ordered that the demurrer be heard on October 11. Approximately two weeks prior to the scheduled hearing date, the Employer obtained new legal counsel to represent it in its litigation against the Union. On October 5, the Employer, through its new legal counsel, voluntarily dismissed its second amended complaint with prejudice. On October 12, the state court granted the Employer's dismissal request.

ACTION

We agree with the Region that complaint should issue, absent settlement, alleging the Employer violated Section

 $^{^4}$ All remaining dates are in 2000 unless otherwise indicated.

⁵ On January 17, 2001, the Union orally withdrew the Section 8(a)(4) portion of the charge.

8(a)(1) of the Act by filing a state court lawsuit against the Union and the Union's President that is meritless and retaliatory within the meaning of <u>Bill Johnson's</u>.

Under the Supreme Court's analysis in <u>Bill Johnson's</u>, above, the Board can find a suit that has concluded to be an unfair labor practice if: (1) the lawsuit was without merit, and (2) the plaintiff filed the suit with a retaliatory motive. In Alberici Construction, ⁶ it was noted that,

[t]he Board has consistently interpreted <u>Bill</u> <u>Johnson's Restaurants</u> to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.⁷

In determining whether a lawsuit has a retaliatory motive, the Board takes into consideration factors such as the baselessness of the lawsuit; 8 whether the lawsuit is motivated by and directly aimed at protected activity; 9

 $^{^6}$ Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199 (1992), enf. den. on other grounds 15 F.3d 677 (7th Cir. 1994).

^{8 &}lt;u>Bill Johnson's Restaurants</u>, 461 U.S. at 747. See also <u>Diamond Walnut Growers</u>, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995); <u>Phoenix Newspapers</u>, 294 NLRB at 49 (1989).

⁹ BE & K Construction, 329 NLRB No. 68, slip op. at 10 (September 30, 1999) (lawsuit aimed at union's legislative lobbying, suit filing, and instituting grievance and arbitration proceedings); Summitville Tiles, 300 NLRB at 65 (lawsuit motivated by employees' and union's filing of Board charges and state court lawsuit against employer); H.W. Barss Co., 296 NLRB 1286 (1989) (lawsuit aimed at lawful picketing).

prior animus against the defendant in the lawsuit; 10 and whether the lawsuit seeks damages in excess of mere compensatory damages. 11

1. Lawsuit Lacked Merit

We conclude that the Employer's state court suit lacked merit. According to the Board, a voluntary dismissal of a claim, with prejudice, is an admission by the plaintiff that the claim lacks merit. In BE & K Construction, above, the employer filed a lawsuit against the union in federal court alleging several claims under Section 303 and the Sherman Act. The court granted partial summary judgment in favor of the union on some of the claims. However, the employer voluntarily withdrew the remaining claims with prejudice. In finding that the voluntarily dismissed claims were unmeritorious, the Board relied on the Supreme Court's suggestion in Bill Johnson's that a withdrawn claim lacks merit:

If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. 12

Furthermore, the Board reasoned that according to the Federal Rules of Civil Procedure, a voluntary dismissal, with prejudice, is a complete adjudication. Such dismissal, the Board explained, is subject to the rules of res judicata and is binding on the parties and their privies. Thus, the Board concluded that the withdrawn claims were unmeritorious for <u>Bill Johnson's</u> purposes.¹³

Summitville Tiles, 300 NLRB at 66; Machinists Lodge 91 (United Technologies), 298 NLRB at 326.

See, e.g., Petrochem Insulation, Inc., 330 NLRB No. 10, slip op. at 5 (1999), enfd. F.3d, 2001 WL 61078 (D. C. Cir. 2001); Diamond Walnut Growers, 312 NLRB at 69; Phoenix Newspapers, 294 NLRB at 49-50; H.W. Barss Co., 296 NLRB at 1287.

^{12 &}lt;u>BE & K Construction</u>, 329 NLRB No. 68, slip op. at 7 (quoting Bill Johnson's, 461 U.S. at 747).

 $^{^{13}}$ BE & K Construction Co., above, slip op. at 7 and n. 33. We note that the Board distinguished its decision in Vanguard Tours, 300 NLRB 250 (1990), enf. denied in relevant

Similarly, the voluntarily dismissed claims in the instant case are unmeritorious. Indeed, the Employer voluntarily dismissed its second amended complaint "with prejudice." Under California law, a voluntary dismissal of a suit, with prejudice, is considered a final determination on the merits in favor of the defendant. Moreover, such dismissal invokes the principles of res judicata. Thus, based on the Board's discussion in BE & K Construction, the voluntary dismissal of the complaint, with prejudice, is an admission by the Employer that its suit lacked merit. Accordingly, the Employer's state court lawsuit against the Union and Union President Walsh was meritless.

2. Lawsuit Filed With Retaliatory Motive

We further conclude that the Employer filed its suit with a retaliatory motive. As previously discussed, evidence of retaliatory motive may be established where a lawsuit seeks damages in excess of compensatory damages and/or a lawsuit is motivated by and is directly aimed at protected activity. ¹⁵ Evidence of a retaliatory motive exists in the instant case where the Employer seeks exemplary and punitive damages. Furthermore, the face of the complaint, in addition to statements made by the

part 981 F.2d 62 ($2^{\rm nd}$ Cir. 1992) on the basis that in that case, there was no indication that the employer voluntarily withdrew its claim "with prejudice." In <u>Vanguard Tours</u>, the Board declined to read the above quoted portion of the Court's opinion in <u>Bill Johnson's</u> as suggesting that the withdrawal of a lawsuit is in all circumstances equivalent to a showing of lack of merit. The Board found that under the circumstances presented in that case, the employer's withdrawal of its suit was presumptively an admission that the suit lacked merit, and that the employer had failed to rebut the presumption. 300 NLRB at 255. Conversely, in <u>BE & K Construction</u>, the Board concluded that the employer's voluntary withdrawal, "with prejudice," was an admission that its claims lacked merit.

¹⁴ See, e.g., Rice v. Crow, 97 Cal. Rptr. 2d 110, 116
(Ct.App. 2000); Roybal v. University Ford, 255 Cal. Rptr.
469, 472 (Ct.App. 1989).

¹⁵ See <u>Phoenix Newspapers</u>, 294 NLRB at 50 (lawsuit attacking union communication to members regarding pending Board charges found retaliatory because it was "unequivocally aimed directly at protected concerted activity").

Employer, reveals that the lawsuit was motivated by and directly aimed at the Union's exercise of protected Section 7 rights.

a. Lawsuit Aimed at Protected Third Party Appeal

First, the face of the complaint reveals that the lawsuit was directly aimed at the sending of the letter to customer DSL that expressed frustration over the negotiations with the Employer. Generally, appeals to third parties for support during a labor dispute are protected. Thus, the Employer's lawsuit was clearly retaliatory as it directly attacked the Union's protected third-party appeal to DSL.

We reject the Employer's argument that the sending of the letter to customer DSL did not constitute protected activity because it contained false statements and was sent with the intention of causing DSL to terminate its contract with the Employer. Such argument is without merit as the Union's purpose in sending the letter was protected. Moreover, the letter did not contain any falsehoods sufficiently malicious or material to render the letter unprotected. In this regard, Union President Walsh stated under oath, in the March unfair labor practice hearing, that the only purpose in sending the letter to DSL was to "get DSL to tell WGI to come back and negotiate in good faith." The Board has found that similar appeals to third parties for support during a labor dispute are protected. 17 Even assuming, as the Employer contends, that the Union sent the letter to DSL with the purpose of causing DSL to terminate its contract with the Employer, such purpose still does not render the Union's activity unprotected. Indeed, an employee/union member engages in protected Section 7 activity when it appeals to a third party to cease doing business with an employer with which it has a labor

 16 See, e.g., The Sacramento Union, 291 NLRB 540, and n. 33 (1988), enfd. 889 F.2d 210 (9th Cir. 1989) and cases cited therein for discussion of the right of employees to make third-party appeals.

The Sacramento Union, above at 549-50 (union members/employees of newspaper engaged in protected activity when they sent letters to newspaper's advertisers expressing frustration with employer concerning efforts at reaching "fair agreement" and urging advertisers to contact employer and express their concern over the future of the newspaper).

dispute. 18 Thus, the Union's purpose in sending the letter to DSL did not render its activity unprotected.

With regard to its false statement allegation, the Employer notes that Union President Walsh acknowledged under oath, in the March unfair labor practice proceeding, that the statement about another union coming in to take over the contract was false. However, this false statement is not the type of malicious falsehood that would render the sending of the letter to DSL unprotected activity. Indeed, third-party appeals made in the context of a labor dispute are protected to the extent "the communication is related to an ongoing labor dispute and . . . the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection."19 Walsh's false statement was clearly related to the ongoing labor dispute between the Union and the Employer concerning the negotiations for a successor agreement. Furthermore, the false statement concerned an action to be taken by the Union and did not even concern, or disparage, the Employer's operation in any manner. In this regard, we note that it does not appear that an employer has ever alleged that a union's third-party appeal was unprotected due to a false statement made by the union about the union.²⁰

¹⁸ See, e.g., NLRB v. Servette, Inc., 377 U.S. 46 (1964) (employees of wholesale food distributor engaged in protected activity when they asked managers of supermarkets that were customers of their employer to support the strike and cease doing business with the employer); Lineback v. Printpack, 979 F.Supp. 831 (S.D. Ind. 1997) (court found sufficient likelihood that union's letter to customers asking them to withdraw their patronage from the employer if management provokes a strike was protected activity).

 $^{^{19}}$ See Emarco, 284 NLRB 832, 833 (1987) (Board noted the principles set forth by the Board and affirmed by the Supreme Court in NLRB v. Electrical Workers, IBEW Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), involving the protected nature of third party appeals made by employees in the context of a labor dispute).

²⁰ Cf., NLRB v. Electrical Workers, IBEW Local 1229 (Jefferson Standard), 346 U.S. at 475-77; The Sacramento Union, 291 NLRB at 548; Richboro Community Mental Health Council, 242 NLRB 1267, 1268 (1979); Allied Aviation, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3rd Cir. 1980); and Emarco, 284 NLRB at 833-34.

In addition, we note that Walsh also stated, in the same March hearing referred to above, that the false statement was made out of frustration with the Employer as a result of the unsuccessful negotiations, and in an effort to get the attention of customer DSL. Thus, the statement appears to be the kind of hyperbole and puffery that, as the Board has often acknowledged, occurs in the context of labor disputes without depriving the conduct of the protection of Section 7.21 Furthermore, the false statement was not a "material" misrepresentation relied on by the Employer in filing its lawsuit. Indeed, the Employer had already filed its lawsuit alleging the Union unlawfully sought to interfere in its relationship with DSL before it ever learned that Walsh said her statement was false. 22 The lawsuit originally only relied on the alleged falsity of a statement accusing the Employer of bargaining in bad faith, made at a time when there had been a meritorious Section 8(a)(5) charge filed. Accordingly, the Union's false statement about bringing in another union did not render its appeal to DSL unprotected.

b. Lawsuit Motivated by Grievance Filing

In any event, without regard to the protected nature of the Union's letter, a retaliatory motive can also be found where the evidence reveals that the suit was motivated by the Union's exercise of other protected activity.²³ Indeed,

See generally Emarco, 284 NLRB at 834 (Board determined that statements made by employees about their employer to a third party asserting that "these people never pay their bills," "can't finish the job," "is no damn good," and "this job is too big for them. . ." were protected Section 7 activity as the statements merely reflected bias and hyperbole made in the context of an emotional labor dispute clearly identified as such to the third party). See also The Sacramento Union, 291 NLRB at 549 (employees/union members wrote newspaper's advertisers to seek help in their labor dispute and raised questions about the continuing viability of the newspaper as a part of their appeal in order "to invoke any interest which the employees arguably shared with the advertisers, even if for different reasons").

²² The Employer filed its first amended complaint on January 11 and did not learn of the falsity of Walsh's statement until the March unfair labor practice hearing.

²³ If the lawsuit was filed in an attempt to retaliate against the Union for engaging in protected activity, and

statements made by the Employer prior to the filing of its lawsuit further demonstrate the Employer's motive in filing the lawsuit. Various documents produced pursuant to a Board subpoena in the litigation of the other unfair labor practice charges involving the parties revealed that the Employer filed its lawsuit against the Union with the intention of retaliating against the Union's filing of grievances. The Employer provided the Region with the documents, and gave the Region permission to share the documents with the Union.

One such document produced was a facsimile dated April 21, 1999, sent from the Employer to its counsel. According to the facsimile, the Employer was alerting its counsel to an April 16, 1999 letter from the former Employer chairman to DSL. The facsimile asserts that letter may "interfere with [the Employer's] plan to threaten the Union with a lawsuit. . . to use as a bargaining chip" against the then pending arbitration decisions regarding grievances filed over the Employer's failure to pay union dues and fees. The letter referred to in the facsimile discusses, inter alia, DSL's cancellation of its contract with the Employer and attributes it to DSL's loss of business, rather than any concerns caused by the Union's letter.

Also discovered during the litigation of the other charges was an e-mail dated August 17, 1999, sent from the Employer's counsel to the Employer's president asking for permission to threaten the Union with a lawsuit to make the Union "more realistic" about settlement of the grievances. In addition, a second e-mail dated August 20, 1999, sent from the Employer's counsel to its president discussed the "grim" prospect of settling the grievances and stated, "[t]he time to file the suit against the Union has arrived. We must continue to fight the other cases. We must try to keep money away from the Union." Thus, without regard to the protected nature of the Union's January 21, 1999, letter to DSL, statements made by the Employer reveal that its lawsuit was filed in retaliation against the Union for engaging in other protected Section 7 activity. above statements reveal that the Employer's lawsuit was motivated by and filed in direct response to the Union's exercise of its protected right to institute grievance and

the suit was unmeritorious, "the suit was unlawful, regardless of whether it was also targeted at activities that were not protected." $\underline{\text{BE \& K Construction}}$, above, slip op. at 10.

arbitration procedures.²⁴ Thus, the Employer's lawsuit was filed with a retaliatory motive.

Accordingly, we conclude that the Employer violated Section $8\,(a)\,(1)$ by filing a state court lawsuit against the Union that lacked merit and was filed with a retaliatory motive.

B.J.K.

²⁴ We note that the communications referred to above appear to be attorney-client communications. However, it appears that any attorney-client privilege as to these documents was waived where the documents were voluntarily produced pursuant to a Board subpoena; the Employer has not asserted the documents are privileged; and the documents were disclosed to and have been in the possession of the Region and the Union for a period of about one year. See Bud Antle, Inc. v. Grow Tech Inc., 131 F.R.D. 179, 183-84 (N.D. Cal. 1990) (attorney-client privilege waived where plaintiff did not take reasonable precautions to prevent disclosure of privileged documents, did not act to recover the letter for six weeks, where the letter was fully disclosed, and where defendants relied on letter), citing Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. $\overline{1985}$); Cunningham v. Connecticut Mutual Life Ins., 845 F.Supp. 1403 (S.D. Cal. 1994).